United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7362

To be argued by
CARL SAKS

Original

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BARBARA DAVIS, :

Plaintiff-Appellant, : 76 Civ. 3631

-against- :

HON. FRANK GULLOTTA, JAMES D'APRICE, :
Judges of the City Court of Yonkers,
et al., :

Defendants-Appellees. :

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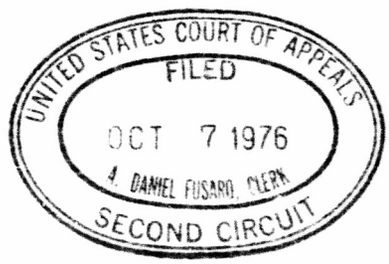

BRIEF FOR DEFENDANTS-APPELLEES

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellees
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3393

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

CARL SAKS
Assistant Attorney General
of Counsel

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BRIEF FOR DEFENDANTS-APPELLEES

Statement

This is an appeal by the plaintiff from a judgment dated April 29, 1976, by which a three judge panel in the United States District Court for the Southern District of New York (Gurfein, Greisa and Stewart, JJ.) unanimously dismissed a class action brought by the plaintiff pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) seeking declaratory and injunctive relief to secure what plaintiff thought was her federal constitutional right to the assignment of counsel in certain State infraction proceedings and to declare unconstitutional New York Criminal Procedure law § 170.10(3)(C) and New York County Law § 722-a.*

* At the outside it should be noted that the Appeal here is properly for the Supreme Court, pursuant to 28 USC § 1253, and not for this Court.

Facts

The plaintiff, Barbara Davis, was arrested on June 3, 1974 and charged with operating a car without a license, a violation of Vehicle and Traffic Law § 509(1) as well as driving while intoxicated, a violation of § 1192(2) and (3) of the Vehicle and Traffic Law. The charge of driving without a license, a traffic infraction, punishable by a $50 fine, 15 days in jail or both, was made returnable in Yonkers traffic court on July 31 after plaintiff had entered a plea of not guilty. The charge of driving while intoxicated, a misdemeanor, was returnable in the Yonkers Criminal court. At a hearing in traffic court on July 31, 1974, plaintiff requested the assignment of counsel, alleging that she was unable to retain counsel privately, which was rejected by Judge D'Apr[illegible]e who then adjourned the case until September 17, 1974.

On or about August 21, 1974, plaintiff, alleging jurisdiction under the Civil Rights Act, brought this action for injunctive and declaratory relief, alleging that the defendants have refused to grant her counsel and challenging the constitutionality of New York Criminal Procedure Law § 170.10(3)(C) and County Law § 722A. These statutes do not require the assignment of counsel in traffic infraction matters.

On September 9, 1974, the Clerk of the traffic court informed plaintiff by letter that "You have the right to the aid of counsel at all stages of this action, and if you are financially unable to obtain counsel, the court will assign an attorney to represent you." The letter also advised the plaintiff that her case had been adjourned until October 1, 1974. On that date the traffic infraction case was transferred to the Yonkers Criminal Court and made returnable with the misdemeanor charge on December 27, 1974.

Meanwhile, on September 11, 1974, defendants moved to dismiss the complaint as moot since the plaintiff had been informed through the Clerk's letter of September 9, 1974 of her right to counsel. On October 25, plaintiff, now represented by the Legal Aid Society, filed an amended complaint expanding her case to make it a class action on behalf of all indigent defendants who are accused of traffic infractions and are unable to obtain counsel. In addition thereto, the plaintiff moved to aid Patrolman Matthew Walsh, the arresting officer. The amended complaint also named, inter alia, the Justice of the Appellate Division of the New York State Supreme Court as parties defendants.

Subsequently, Governor Carey was also named as a defendant. The amended complaint sought essentially the same relief originally sought.

In December, 1975, Judge Stewart denied the defendant's motion to dismiss the complaint on the ground of mootness and characterized the defendants' offer of counsel to the plaintiff as voluntary cessation of an alleged illegal course of conduct. The court also granted the plaintiff's motion to add Patrolman Walsh as a party defendant and convened a three judge court to hear the plaintiff's constitutional attack, refusing also to rule on the defendants' contention that Younger v. Harris, 401 U.S. 37 (1971) barred the action in the federal courts.

On April 29, 1976, the three judge court, after oral argument, dismissed the complaint from the bench, ruling that the action was barred by the Younger v. Harris doctrine since there was an ongoing State criminal prosecution pending.

At present the Yonkers matter remains unresolved since the plaintiff's court appointed counsel, Laurence Eckers, Esq. has moved to dismiss the complaint against his client and such motion is sub judice.

POINT I

THERE IS NO ESCAPE FROM THE CONCLUSION THAT THE RESORT TO THIS COURT IS BARRED BY THE DOCTRINE ENUNCIATED IN YOUNGER V. HARRIS, 401 U.S. 37 (1971) AND THE SUCCEEDING SUPREME COURT CASES.

The plaintiff's request for an order enjoining her prosecution on a traffic infraction charge in the New York Courts is clearly violative of the principle enunciated in Younger v. Harris, 401 U.S. 37 (1971) as held by the three judge court holding that the courts should not interfere with pending state criminal proceeding except under extraordinary circumstances where the danger of irreparable loss to the defendant is both great and immediate or where the prosecution was undertaken in bad faith or to harass the defendant. This is a long standing judicial tradition and has been recently reiterated in Rizzo v. Goode, 96 S. Ct. 598 (1976).

As was said (96 S. Ct. at 608):

> "But even where the prayer for injunctive relief does not seek to enjoin the state criminal proceedings themselves, we have held that the principles of equity nonetheless militate heavily against the grant of an injunction except in the most

> extraordinary circumstances. In O'Shea v. Littleton, supra, at 502, we held that ' a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted.' And the same principles of federalism may prevent the injunction by a federal court of a state civil proceeding once begun. Huffman v. Pursue, Ltd. 420 U.S. 592 (1975)."

The plaintiff hopes to evade the application of the Younger doctrine by dividing her proposed class into three subdivisions. Specifically the subclasses are the (1) indigent traffic infraction defendants against whom charges were pending before December 23, 1975. The plaintiff does not include herself in this class since she concedes the assignment of counsel to her has mooted the action as to her. (See appellant's brief page 13, note 18,) (2) indigent traffic infraction defendants against whom traffic infraction proceedings were commenced subsequent to December 23, 1975 and (3) indigent traffic infraction defendants against whom there will be traffic proceedings pending in the future. December 23, 1975 being the date of Judge Stewart's decision denying the defendant's motion to dismiss and ordering the convening of a three-judge court to consider this matter.

The plaintiff frivolously contends that the Younger doctrine has no application to subclasses 2 and 3 because there are no pending state traffic infraction proceedings against them at the moment. This, of course, is simply nonsense. The issuance of the traffic ticket for the moving violation is the commencement of the proceeding returnable in the local court as to subclass 2.

The plaintiff further urges that the principles of comity and federalism described in Younger are inapplicable to situations where a plaintiff seeks to vindicate federal situations where a plaintiff seeks to vindicate federal constitutional rights in the federal courts and there are no criminal prosecutions pending against such plaintiff in the state courts involving the issues presented to the federal judiciary. [This plainly is not the case here because it is the plaintiffs who are maximizing the traffic infractions because of the statute's reference to fine or imprisonment and we are (by assumption of the plaintiffs) dealing with pending traffic infraction proceedings.]

The alleged prosecutions faced by subclass 3 of the plaintiff's proposed class are at best speculative and problematic since these people have not been summoned,

arrested or threatened with prosecution. Certainly, this class does not face the genuine threat of prosecution that the petitioner in Steffel v. Thomas, 415 U.S. 452 (1972) encountered.

The Steffel Court noted (415 U.S. at 459):

> "Unlike three of the appellees in Younger v. Harris, 401 U.S. at 41, petitioner has alleged threats of prosecution that cannot be characterized as 'imaginary or speculative' Id. at 42. He has been warned to stop handbilling at the Shopping Center and disobeys a warning to stop, he will likely be prosecuted." (emphasis supplied)

Here, as between subclass 3 and the defendants there is no real or live case, but merely the possibility of controversy arising in the future. As the Court noted in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 221 (1974):

> "Only concrete injury presents the factual context within which a court aided by parties who agree within the context is capable of making decisions." Hamar Theatre, Inc. v. Cryan, 393 F. Supp. 34, 40-41 (D.N.J. 1975).

As noted above, Younger v. Harris, (supra) applies to subclass 2 because the issuance of traffic summonses to the people in such class represents the commencement of State prosecution.

Plaintiff alleges that subclass I will suffer irreparable harm because the New York courts will not offer them a meaningful forum to present their views on the issue of assigned counsel to indigent traffic infraction defendants.

The plaintiff bases such contention on People v. Farino, 36 N Y 2d 283 (1975). There the court ruled that Argersinger v. Hamlin, 407 U.S. 25 (1972) did not compel the assignment of counsel to a motorist who wishes to appeal from a traffic infraction conviction where he no longer faces the possibility of imprisonment since neither the New York Constitution or State statutes mandates counsel in traffic infraction charges. This determination is, of course, in accord with Argersinger which requires counsel only if the trial court has the option of fining a convicted traffic offender, upon conviction, may be sent to jail if at the outset of the hearing counsel was not tendered.

An examination of the New York authorities reveals that the law on the subject under consideration is in flux.

See People v. Weinstock, 80 Misc 2d 510, 511 (App. Term 2d Dept. 1974). There the appellate court ruled "...that defendants charged with traffic violations and subject to possible imprisonment, must be advised of their right to counsel and have counsel assigned when the defendant is financially unable to obtain same." The authority of Weinstock is not in conflict with the subsequent Farino decision since the factual patterns are essentially different.

This decision, as will be demonstrated, is clearly beyond the teaching of Argersinger and whether it is the law of New York will be decided by the Court of Appeals. It does, however, establish that the Argersinger decision is not being ignored and that the courts of the State provide an open forum for the exploration of the issues sub judice.

Even where there is doubt about state law, it is for the state courts to pass upon it. Most recently, the Supreme Court reiterated this principle of judicial restraint in Sugar v. Carey, 46 L.Ed 2d 33 (1975) where the Supreme Court directed a three-judge court to abstain from a decision construing the validity of a New York attachment statute until the New York Court had an opportunity to speak on the subject. Also see Mitchum v. Foster, 407 U.S. 225, 230 (1972).

Furthermore, the implication that the New York courts will defy the Argersinger ruling is simply absurd.

As was said in Huffman v. Pergue LTD, 420 U.S. 592, 611 (1975) reh. den. 421 U.S. 971 (1975):

> "Appellee is in truth urging us to pass a rule on the assumption that State Judges will not be faithful to their constitutional responsibilities. This we refuse to do."

This thought was reiterated in Schlesinger v. Councilman, 420 U.S. 738, 755, 607 (1975).

B.

The plaintiff contends that Younger applies only when the relief requested would halt a state prosecution or compel continuous federal involvement in state affairs. But the cited Supreme Court cases authoratively exclude this particular contention. The cases cited by us hold in unmistakable language that any interference with pending criminal proceeding (or as Huffman held proceedings having criminal overtones) is barred under the Younger doctrine and repeated in Rizzo v. Goode (supra). Also see Wallace v. Kern, 520 F.2d 400, 405; cert. den. 96 S. Ct. 1109 (2d Cir. 1975); Bedrosian v. Mintz, 518 F.2d 396, 399 note 5 (2d Cir. 1975).

These cases establish that Younger v. Harris applies not only to a situation where the relief requested is the enjoining of a state prosecution but to ancillary issues as well - such as the assignment of counsel.

POINT II

ARGERSINGER V. HAMILTON, 407 U.S. 25 (1972) MERELY BARS THEIMPRISONMENT OF AN INDIGENT DEFENDANT WHO WAS UNCOUNSELLED AT THE TIME OF HIS CONVICTION. IT DOES NOT, HOWEVER, REQUIRE THE ASSIGNMENT OF COUNSEL TO SUCH INDIGENTS TO DEFEND AGAINST THE COLLATERAL CONSEQUENCES THAT MAY FLOW FROM AN UNCOUNSELLED CONVICTION.

The effort of plaintiff to procure a holding that counsel must be supplied to fraffic offenders even where there is no incarceration predicated against the collateral consequences which may follow any such conviction is a repetition of the contention made in Argersinger (407 U.S. 25) and not adopted. The portentous consequences of the still broader rule sought here by plaintiff runs right through the discussion in that case in the plurality and concurring opinions. Indeed to point this up the opinion of Justice Douglas notes in a footnote (407 U.S. at 39) that:

> "Of the 1,288,975 people convicted by the City of New York in 1970 for traffic infractions only were fined and imprisoned, given suspended sentences, or jailed. Criminal Court of the City of New York Annual Report 11 (1970). Of the19,187 convicted of more serious traffic offenses, such as driving under the influence, reckless driving, and leaving the scene of an accident, 404 (2.1%) were subject to some form of imprisonment. Ibid."

The opinions note the collateral consequences which may flow from a traffic infraction conviction carrying no sentence of incarceration (see 407 U.S. at 48). Plainly therefore there is no duty upon the State under the Supreme Court decision to appoint counsel except where the defendant in such petty offense faces some imprisonment.

This is made further clear in the concluding paragraph of Justice Douglas' opinion (407 U.S. at 40):

> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of the 'guiding hand of counsel' so necessary when on liberty is in jeoparty". (emphasis supplied).

Justice Powell also noted that the holding Argersinger makes a clear distinction between the loss of liberty and collateral consequences that may flow from an uncounselled conviction such as loss of one's driving license. See Marston v. Oliver, 485 F.2d 705, 707 n. 4 (4th Cir. 1973), cert. den. 417 U.S. 396 (1974); Morgan v. Juvenile & Domestic Relations Court of Halifax County, 491 F.2d 456, 457 (4th Cir. 1974), Linkous v. Jordan, 401 F. Supp. 1175 (W.D. Virginia 1975).

In view of the foregoing it is evident that the appellant's contention is without merit.

POINT III

THE COMPLAINT, SUB JUDICE, SHOULD BE DENIED CLASS CERTIFICATION SINCE ANY DECISION FAVORABLE TO THE PLAINTIFF WILL BENEFIT ALL OTHER INDIGENT TRAFFIC INFRACTION DEFENDANTS IN NEW YORK.

This Court has developed a judicial policy which mandates that plaintiff's complaint be denied class certification.

Briefly stated where, as here, a prohibitory injunction against a state statute is sought, declaratory and injunctive relief will adequately protect all persons subject to he challenged law eithout the need for class designation or certification. Galvan v. Lavine, 490 F.2d 1255, 1261-62 (3d Cir. 1973), cert, den. 417 U.S. 936 (1974); Vulcan Society v. Civil Service Commission, 490 F.2d 397, 399 (2d Cir. 1973). See also United States v. Hall, 472 F.2d 261, 266 (5th Cir. 1972); Bailey v. Patterson. 323 F.2d 201, 206-207 (5th Cir. 1963), cert. den. 376 U.S. 910 (1964). This Court can properly assume that an agency of the government would not persist in taking actions which violate the unnamed class plaintiff's rights if the statutes under consideration are declared unconstitutional.

Further, apart from the foregoing the plaintiff has not sustained any injury by operation of the challenged New York Statutes. The plaintiff herself recognized this when she said,

> "...Barbara Davis...seeks no injunctive relief by this action since has already been assigned counsel."

See page 13, note 18 of appellant's brief. (The lack of injury incurred by the plaintiff operation of the New York Statutes has been demonstrated in Point II of this brief.) It is axiomatic a plaintiff has standing to raise only those issues by which he is personally aggrieved. See Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 201 (1974.

Only an uncounselled indigent defendant who is sentenced to jail would be a proper class action representative to attack the New York Statutes under consideration here. 407 U.S. at 40.

POINT IV

THERE IS NO CASE OR CONTROVERSY BETWEEN THE PARTIES.

It is clear that constitutional questions are not to be determined unless there is a real conflict between the parties to the litigation which requires the resolution of the constitutional problem.

As the Supreme Court put it in North Carolina v. Rice, 404 U.S. 244, 246 (1971):

> "Early in its history, this Court held that it had no power to issue advisory opinions---and it has frequently repeated that the Federal Courts are without power to decide questions that cannot effect the right of the litigants in the case before them"...See also Golden v. Zwiekler, 394 U.S. 103 (1969).

Mendez v. Heller, 380 F. Supp. 985 (E.D.N.Y. 1974), decree or order may be entered from which a timely appeal may be taken remanded to Circuit Court in 420 U.S. 916 (1975 affirmed sub. nom. Mendez-Roman v. Heller, 530 F. 2d 457 (2d Cir. 1976) is a very recent reiteration of the principle that no federal court has jurisdiction to pronounce a statute void unless it called to determine the legal right of the parties in an actual case or controversy.

In Mendez (supra) a wife brought a Civil Rights action against a Judge of the Kings County Matrimonial Part and others attacking the residence provision of the New York Domestic Relations Law § 230(5).

In response to a motion to dismiss the complaint as to the Judge the Court held that the crux of the suit against him was in his judicial capacity, not as an adversary and long established precedent precluded such a suit (380 F. Supp. 985, 989-90).

Most recently a three-judge court convened in this District, to determine the validity of § 237 of the New York Domestic Relations Law in the case of Gras v. Stevens, et al., 76 Civ. 9 (S.D.N.Y.) determined that there can be no controversy between a plaintiff and a judge acting in his judicial capacity.

Nor does the plaintiff have a controversy with Governor Carey since he has no special responsibility for the enforcement of the controverted statutes herein over and above his general duties as chief executive of New York. State Constitution Article IV, § 1. Fitts v. McGhee, 172 U.S. 516 (1899); Oliver v. Board of Education, 306 F. Supp. 1286 (S.D.N.Y., 1969).

To render a state officer a proper defendant in a suit to enjoin the application of a state statute, he must have enforcement responsibility for the task the Statute imposes.

The view just expressed above was recently enforced in the Gras v. Stevens (S.D.N.Y. 76 Civ 9). There the court held that the mere fact that Governor Carey was in general charged with the enforcement of New York Law under the State

Constitution (Article IV § 3) did not make him a proper party to determine the constitutionality of § 237 of the Domestic Relations Law since he had no special obligation for its enforcement. As the Court observed:

> "However all this may be, we know of no case in which the general duty of a governor to enforce State laws has been held sufficient to make him a proper party defendant in a civil rights action attacking the constitutionality of a state statute concerning matrimonial or other private civil actions."

Since the Governor has no special responsibility for the enforcement of either the Criminal Procedure Law and the County Law, it is obvious, under the authority of Gras v. Stevens, (supra) there is no cause of action against him.

The same principle applies all the more to Patrolman Walsh since he has no interest in either seeing the plaintiff obtain counsel or having counsel denied to her. It needs no elaborate commentary to realize that Patrolman Walsh has no authority to afford or deny the plaintiff counsel - the relief desired by her. The only role the Patrolman has played in this litigation is the issuance of the summons. Therefore, it is obvious that the Patrolman has no connection with the contested statutes and is not a proper party here.

Based upon the above analysis, the conclusion is compelled that there is no justiciable issue between the plaintiff and the defendants.

CONCLUSION

WHEREFOR THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
September 27, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Appellees

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

CARL SAKS
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Edith Lopez , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 5th day of October , 1976 , she served the annexed upon the following named person :

Patrick Wall, Esq.
36 West 44th Street
New York, N.Y. 10036

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Edith Lopez

Sworn to before me this
6th day of October , 1976

Carl Sachs
Assistant Attorney General
of the State of New York